

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARK FREGIA,

No. 2:19-cv-2196 JAM KJN P

Plaintiff,

v.

P.A. MIRANDA, et al.,

ORDER AND FINDINGS AND
RECOMMENDATIONS

Defendants.

Plaintiff is a state prisoner, proceeding without counsel. The fully-briefed motion to dismiss filed by defendants P.A. Miranda and Dr. Ridge is now before the court.¹ As discussed below, the defendants' request for judicial notice is granted, plaintiff's request for judicial notice is denied, the undersigned recommends that defendant Miranda's motion be granted, and that defendant Dr. Ridge's motion to dismiss be denied, and this action be transferred to the Fresno Division of the Eastern District.

I. Requests for Judicial Notice

Moving defendants ask the court to take judicial notice of certain pleadings, records and filings in Fregia v. St. Clair, et al., No. 1:16-cv-1866 (E.D. Cal. Fresno Div.). (ECF No. 38-2 at ////

¹ Defendant Dr. Savage filed an answer on March 23, 2020. (ECF No. 28.)

1 5-10.) Plaintiff did not oppose the request. Good cause appearing, defendants' request is granted.
2 Fed. R. Evid. 201(b).

3 On the other hand, plaintiff seeks judicial notice of certain medical records, the first page
4 of his complaint filed in St. Clair, copies of administrative appeals, a health care services request
5 form, and a medical chrono. (ECF No. 41 at 13-38.) For purposes of dismissal under Rule
6 12(b)(6), the court generally considers only allegations contained in the pleadings, exhibits
7 attached to the complaint, and matters properly subject to judicial notice. Akhtar v. Mesa, 698
8 F.3d 1202, 1212 (9th Cir. 2012). The exhibits plaintiff submitted with his request for judicial
9 notice, aside from page one of his complaint in St. Clair, No. 1:16-cv-1866, are not properly
10 subject to judicial notice. Therefore, plaintiff's request for judicial notice is denied. In
11 addressing the instant motion to dismiss, the court solely considers plaintiff's complaint, exhibits
12 appended to his complaint, and the records and filings in plaintiff's prior case, St. Clair.

13 II. Are Plaintiff's Claims Against P.A. Miranda Time-Barred?

14 A. Standards Governing the Statute of Limitations

15 Because 42 U.S.C. § 1983 does not have its own limitations period, this court applies
16 California's "statute of limitations for personal injury actions, along with the forum state's law
17 regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent
18 with federal law." Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). California's statute of
19 limitations for personal injury actions is two years. Cal. Civ. Proc. Code § 335.1; Jones v.
20 Blanas, 393 F.3d at 927; Maldonado v. Harris, 370 F.3d 945, 954-55 (9th Cir. 2004).

21 Such limitation period is statutorily tolled for a period of two years for a person who is
22 "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a
23 term less than for life." Cal. Civ. Proc. Code § 352.1. Only prisoners sentenced to life without
24 the possibility of parole are excluded from such additional two-year tolling provision. See
25 Brooks v. Mercy Hospital, 1 Cal. App. 5th 1, 7 (Cal. App. 2016) (holding the statutory language
26 of § 352.1(a) excludes those sentenced to life without the possibility of parole, but is applicable to
27 prisoners serving a sentence of life with the possibility of parole).

28 In addition, prisoners are entitled to tolling during the exhaustion of mandatory

1 administrative remedies. Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (“the applicable
 2 statute of limitations must be tolled while a prisoner completes the mandatory [administrative]
 3 exhaustion process” required under the Prisoner Litigation Reform Act (“PLRA”), 42 U.S.C.
 4 § 1997e(a)).

5 This court must apply California law governing equitable tolling. Jones v. Blanas, 393
 6 F.3d at 927. Under California law, equitable tolling “reliev[es] plaintiff from the bar of a
 7 limitations statute when, possessing several legal remedies he, reasonably and in good faith,
 8 pursues one designed to lessen the extent of his injuries or damage.” Cervantes v. City of San
 9 Diego, 5 F.3d 1273, 1275 (9th Cir. 1993) (quoting Addison v. California, 21 Cal. 3d 313, 317
 10 (1978)); Dimcheff v. Bay Valley Pizza, Inc., 84 F. App’x 981, 983 (9th Cir. 2004). “Under
 11 California law, tolling is appropriate in a later suit when an earlier suit was filed and where the
 12 record shows: (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to
 13 the defendant in gathering evidence to defendant against the second claim; and (3) good faith and
 14 reasonable conduct by the plaintiff in filing the second claim.” Azer v. Connell, 306 F.3d 930,
 15 936 (9th Cir. 2002) (citation and internal quotation marks omitted); Fink v. Shedler, 192 F.3d
 16 911, 916 (9th Cir. 1999). A plaintiff is only entitled to equitable tolling if all three prongs of the
 17 test are satisfied. Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1140 (9th Cir.
 18 2001). Plaintiff bears the burden to plead facts demonstrating he is entitled to equitable tolling.
 19 Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993). “California courts apply equitable tolling
 20 ‘to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer
 21 no prejudice.’” Jones v. Blanas, 393 F.3d at 928 (quoting Lantzy v. Centex Homes, 31 Cal. 4th
 22 363, 370 (2003)).

23 “Although state law determines the length of the limitations period, ‘federal law
 24 determines when a civil rights claim accrues.’” Azer, 306 F.3d at 936 (quoting Morales v. City of
 25 Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). “Under federal law, a claim accrues when
 26 the plaintiff knows or should know of the injury that is the basis of the cause of action.” Douglas
 27 v. Noelle, 567 F.3d 1103, 1109 (9th Cir. 2009) (citation omitted); Maldonado v. Harris, 370 F.3d
 28 945, 955 (9th Cir. 2004). Finally, on a motion to dismiss, this court may resolve the statute of

1 limitations issue only where the “running of the statute [of limitations] is apparent on the face of
2 the complaint.” United States ex rel. Air Control Tech., Inc. v. Pre Con Industries, Inc., 720 F.3d
3 1174, 1178 (9th Cir. 2013) (internal quotation and citations omitted).

4 **B. Discussion**

5 Plaintiff’s allegations as to defendant P.A. Miranda accrued between 2009 and 2014.
6 Plaintiff filed the instant action on October 31, 2019. (ECF No. 1.) Taking plaintiff’s allegations
7 as true, and liberally commencing the limitations period on December 31, 2014, plaintiff had until
8 Monday, December 31, 2018, to bring suit against defendant P.A. Miranda. Absent tolling,
9 plaintiff’s complaint was filed over ten months too late.

10 Plaintiff is allowed tolling for the period of time in which he exhausts his administrative
11 remedies. Brown v. Valoff, 422 F.3d at 943 (holding limitations period tolled while completing
12 required administrative appeal process). However, as pointed out by moving defendants, plaintiff
13 only provided copies of his administrative appeals demonstrating he exhausted his administrative
14 remedies as to defendants Dr. Ridge and Dr. Savage related to their treatment at Sierra
15 Conservation Center on November 17, 2017. (ECF No. 1 at 17-27.) Moreover, in his opposition,
16 plaintiff failed to provide facts or argument demonstrating that the administrative appeal process
17 would grant him sufficient tolling. (ECF No. 41 at 2, 7.) He provided no dates for which
18 exhaustion as to defendant Miranda may have occurred.

19 Nevertheless, even assuming plaintiff exhausted his administrative remedies as to
20 defendant Miranda, plaintiff would not be entitled to any additional tolling beyond the tolling
21 provided as a result of his imprisonment inasmuch as such time would be subsumed within such
22 two year tolling period provided under section 352.1. See Wilkins v. Vancott, 2018 WL
23 3763316, at *5 (N.D. Cal. 2018), citing Oliver v. McDaniel, 2016 WL 4535389 (C.D. Cal. June 2,
24 2016) (“The general rule is that tolling is applied concurrently, not consecutively. Thus, when
25 two tolling provisions apply to the same period of time, they overlap each other and are not
26 tacked onto each other.”).

27 Finally, plaintiff fails to argue he is otherwise entitled to equitable tolling under California
28 law. He does not claim that he was pursuing a legal remedy in another forum.

1 Accordingly, the undersigned finds that it is apparent from the face of plaintiff's
2 complaint that his claims against defendant P.A. Miranda are barred by the statute of limitations,
3 and should be dismissed with prejudice.

4 **III. Are Claims Spared By the Discovery Rule or the Continuing Violation Doctrine?**

5 **A. Discovery Rule**

6 The Ninth Circuit applies the discovery rule in § 1983 cases in which Eighth
7 Amendment violations are alleged. See, e.g., Gregg v. Hawaii, Dep't of Pub. Safety, 870 F.3d
8 883, 886-87 (9th Cir. 2017) (finding an Eighth Amendment deliberate indifference claim accrued
9 when Gregg knew, or had reason to know, through reasonable diligence, that her psychological
10 injuries were caused by improper conduct in therapy); Bibeau v. Pac. Nw. Research Found. Inc.,
11 188 F.3d 1105, 1108 (9th Cir. 1999), opinion amended on denial of reh'g, 208 F.3d 831 (9th Cir.
12 2000) (applying discovery rule in an Eighth Amendment action involving experimental testicular
13 irradiation experiments in prison, brought years after the experiments ended). Federal law
14 determines when the claim accrues. Gregg, 870 F.3d at 887. Under federal law, a civil rights
15 claim accrues “when the plaintiff knows or has reason to know of the injury which is the basis of
16 the action.” Bird v. Dep't of Human Servs., 935 F.3d 738, 743 (9th Cir. 2019) (quoting Morales
17 v. City of Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). A plaintiff “must be diligent in
18 discovering the critical facts.” Gregg, 870 F.3d at 887. “A cause of action accrues even if ‘the
19 full extent of the injury is not then known.’” Id., citing Wallace v. Kato, 549 U.S. 384, 391
20 (2007) (quoting 1 C. Corman, Limitation of Actions § 7.4.1, pp. 526-27 (1991)).

21 Here, as detailed above, plaintiff's complaint demonstrates that by 2014, plaintiff had
22 reason to know that he suffered a skin condition. His allegations demonstrate that plaintiff was
23 aware on or about April 6, 2011, that he was diagnosed with lichen planus. (ECF No. 1 at 3.)
24 Yet plaintiff did not file this action until October 31, 2019. Unlike cases of later-diagnosed
25 cancer or injuries that were not obvious or not discovered until after the limitations period
26 expired, plaintiff's skin condition was obvious and documented in 2011 to 2014. Plaintiff now
27 claims that it was not until January 18, 2017, when he was able to see a dermatologist, that
28 plaintiff was diagnosed with a second skin disease, dermatitis. (ECF No. 41 at 8.) But he also

1 claims that at that time the dermatologist also treated plaintiff's lichen planus. "A cause of action
 2 accrues even if 'the full extent of the injury is not then known.'" Gregg, 870 F.3d at 887.
 3 Therefore, plaintiff does not gain benefit from the discovery rule because his complaint
 4 demonstrates he was aware of his skin condition lichen planus by at least 2011.

5 B. The Continuing Violation Doctrine

6 The continuing violation doctrine is an exception to the discovery rule of accrual which
 7 may allow a plaintiff to seek relief for incidents occurring outside the limitations period. See Bird
 8 v. Dep't of Human Servs., 935 F.3d 738, 746 (9th Cir. 2019), citing Knox v. Davis, 260 F.3d
 9 1009, 1013 (9th Cir. 2001). Historically, the Ninth Circuit recognized two applications: (1) the
 10 "related acts" continuing violation theory, also known as the "serial acts" theory; and (2) the
 11 maintenance of a discriminatory system occurring both before and within the limitations period,
 12 also known as the systematic branch of the continuing violation doctrine. Bird, 935 F.3d at 746.
 13 However, the Supreme Court limited the related acts continuing violation theory in National R.R.
 14 Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). The Court held that "'discrete . . . acts are
 15 not actionable if time barred, even when they are related to acts alleged in timely filed charges'
 16 because [[e]ach discrete . . . act starts a new clock for filing charges alleging that act.]' Bird, 935
 17 F.3d at 747 (citing Morgan, 536 U.S. at 113). See also Carpenteria Valley Farms, Ltd. v. County
 18 of Santa Barbara, 344 F.3d 822, 829 (9th Cir. 2003) ("Although Morgan was a Title VII case . . .
 19 we have applied Morgan to bar § 1983 claims predicated on discrete time-barred acts,
 20 notwithstanding that those acts are related to timely filed claims."). In Bird, the Ninth Circuit
 21 noted it has also applied Morgan "to abrogate the systematic branch of the continuing violations
 22 doctrine as well,"² concluding that "little remains of the continuing violations doctrine." Id., 935

23

 24 ² The Ninth Circuit cited two examples. Bird, 935 F.3d at 747, citing Lyons v. England, 307
 25 F.3d 1092, 1107 (9th Cir. 2002) (reasoning "that a plaintiff's "assertion that [a] series of discrete
 26 acts flows from a company-wide, or systematic, discriminatory practice will not succeed in
 27 establishing the employer's liability for acts occurring outside the limitations period."); Cherosky
 28 v. Henderson, 330 F.3d 1243, 1247 (9th Cir. 2003) (rejecting argument that plaintiffs could
 recover damages under the systematic branch of the continuing violations doctrine as long as such
 acts were conducted under a discriminatory company policy, deciding that "[t]he allegation that . . .
 discrete acts were undertaken pursuant to a discriminatory policy does not extend the statutory
 limitations period." Bird, 330 F.3d at 1247.

1 F.3d at 747. “Except for a limited exception for hostile work environment claims -- not at issue
2 here -- the serial acts branch is virtually non-existent.”³ Id.

3 Thus, after Bird, plaintiff’s allegations fail to meet the continuing violations exception
4 now limited by the Supreme Court and the Ninth Circuit. Plaintiff does not allege facts
5 suggesting a “class-wide pattern-or-practice claim.” Rather, plaintiff alleges defendant P.A.
6 Miranda was deliberately indifferent to plaintiff’s serious medical needs while plaintiff was
7 incarcerated at High Desert State Prison from 2009 to 2014. None of these alleged violations
8 occurred within the four-year limitations period. Therefore, plaintiff cannot satisfy the more
9 restrictive continuing violation test as to defendant P.A. Miranda, and is not entitled to such
10 exception. Plaintiff claims that he continued to suffer from lichen planus, but the “mere
11 continuing impact from past violations is not actionable.” Knox, 260 F.3d at 1013 (emphasis and
12 citation omitted). Thus, the continuing violations doctrine does not save any claim based on
13 plaintiff’s allegations against defendant P.A. Miranda.

14 IV. Are Claims Against Dr. Ridge Barred by Claim Preclusion?

15 A. Legal Standards

16 The doctrine of claim preclusion bars the re-litigation of claims previously decided on
17 their merits. Headwaters, Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1051 (9th Cir. 2005). “Under
18 the doctrine of claim preclusion, a final judgment forecloses ‘successive litigation of the very
19 same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.’”
20 Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742,
21 748 (2001)). “The elements necessary to establish res judicata are: ‘(1) an identity of claims, (2)
22 a final judgment on the merits, and (3) privity between parties.’” Headwaters, Inc., 399 F.3d at
23 1052 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 322 F.3d 1064,
24 1077 (9th Cir. 2003)).

25 When determining, for claim preclusion purposes, whether the present dispute concerns

26
27 ³ The Ninth Circuit further noted that while some room was left for “the systematic branch to
28 apply to class-wide pattern-or-practice claims,” . . . “we have consistently refused to apply the
systematic branch to rescue individualized claims that are otherwise time-barred.” Id.

1 the same claims as prior litigation, the Ninth Circuit considers: “(1) [W]hether rights or interests
2 established in the prior judgment would be destroyed or impaired by prosecution of the second
3 action; (2) whether substantially the same evidence is presented in the two actions; (3) whether
4 the two suits involve infringement of the same right; and (4) whether the two suits arise out of the
5 same transactional nucleus of facts. The last of these criteria is the most important.” Headwaters,
6 Inc., 399 F.3d at 1052 (quoting Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th
7 Cir. 1982) (alterations in original)). Privity between the parties is required. U.S. v. Bhatia, 545
8 F.3d 757, 759 (9th Cir. 2008) (citing U.S. v. Cejas, 817 F.2d 595, 598 (9th Cir. 1987)).

9 B. Discussion

10 As noted by defendants, plaintiff does not dispute that the judgment entered in St. Clair,
11 No. 1:16-cv-1866 AWI JLT, constitutes a final judgment on the merits. “[A] dismissal for failure
12 to state a claim . . . is a ‘judgment on the merits’ to which res judicata applies.” See Stewart v.
13 U.S. Bancorp, 297 F.3d 953, 957 (9th Cir. 2002), quoting Federated Dep’t. Stores v. Moitie, 452
14 U.S. 394, 399, n.3 (1991)). There is privity between the parties because the parties are the same.

15 Therefore, the issue is whether there is an identity of claims. Defendants contend that
16 plaintiff’s Eighth Amendment claim in this action against Dr. Ridge is precluded by plaintiff’s
17 complaint against Dr. Ridge in St. Clair, No. 1:16-cv-1866 AWI JLT, because plaintiff alleged
18 that Dr. Ridge was deliberately indifferent to plaintiff’s serious medical needs by providing him
19 with medications and/or medical treatment with which plaintiff disagreed, and included his claim
20 that Dr. Ridge caused him to develop lichen planus. Thus, defendants argue there is an identity of
21 claims, meeting all of the elements of claims preclusion.

22 Plaintiff concedes that he mentioned the skin disease lichen planus, but only in his original
23 complaint, and “only in the context that he was willing to waive holding the State of California
24 doctors liable for causing him to contract the lichen planus disease through medications they had
25 prescribed.” (ECF No. 41 at 3.) Plaintiff argues that his original complaint was entirely based on
26 the doctors forcing plaintiff to take medications under threats of reprisals if he failed to do so, and
27 asserted his right to refuse medication or request alternative medications. Plaintiff further points
28 out that the disease lichen planus was not mentioned in his second amended complaint, and

1 contends the basis of the instant complaint is entirely different from that pled in St. Clair.

2 Local Rule 220 requires that an amended complaint be complete in itself without
3 reference to any prior pleading. This requirement exists because, as a general rule, an amended
4 complaint supersedes the original complaint. See Ramirez v. County of San Bernardino, 806
5 F.3d 1002, 1008 (9th Cir. 2015) (“an ‘amended complaint supersedes the original, the latter being
6 treated thereafter as non-existent.’” (internal citation omitted)). Once plaintiff filed an amended
7 complaint, the original pleading no longer served any function. Therefore, in order to determine
8 whether plaintiff’s claim against Dr. Ridge is barred by claims preclusion, the court looks to
9 plaintiff’s second amended complaint filed in St. Clair because it was the operative pleading.⁴
10 (ECF No. 38-2 at 92.) In such pleading, plaintiff names Dr. Ridge and Dr. Savage, and
11 essentially objects that they required plaintiff to take insulin after a prior doctor allowed plaintiff
12 to go off insulin. (ECF No. 38-2 at 94-95.) Plaintiff claimed he had the right to refuse medical
13 treatment, and sought money damages. (ECF No. 38-2 at 96.)

14 The undersigned cannot find that such allegations arise out of the same transactional
15 nucleus of facts. There is no mention of plaintiff’s skin condition in the operative pleading, and
16 the resolution of such claim would not involve the same evidence. Finally, the findings and
17 recommendations, adopted in full, are devoid of any reference to plaintiff’s skin condition.
18 Therefore, the undersigned cannot find that plaintiff’s skin condition claim against Dr. Ridge was
19 heard on the merits, or that there was an identity of claims. Accordingly, defendant Ridge’s
20 motion to dismiss should be denied.

21 V. Transfer

22 Plaintiff’s remaining claims are against defendants Dr. Ridge and Dr. Savage, and concern
23 medical care provided at the Sierra Conservation Camp in Jamestown, California. The alleged
24 violations took place in Tuolumne County, which is part of the Fresno Division of the United
25 States District Court for the Eastern District of California. See Local Rule 120(d).

26 ⁴ But even if the court considered plaintiff’s original complaint, the pleading makes clear that
27 plaintiff mentioned the skin condition solely for purposes of settlement. (ECF No. 38-2 at 7) (“If
28 this claim is settled, I will waive my right to sue C.D.C.R. in the future, for the lichen planus they
made me get by keeping me on Metformin and Hydrochlorothiazide.”)

1 Pursuant to Local Rule 120(f), a civil action which has not been commenced in the proper
2 division of a court may, on the court's own motion, be transferred to the proper division of the
3 court. Therefore, this action should be transferred to the Fresno Division of the court.

4 **VI. Order & Recommendations**

5 Accordingly, IT IS HEREBY ORDERED that:

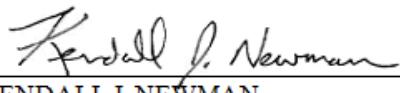
6 1. Defendants' request for judicial notice (ECF No. 38-2 is granted; and
7 2. Plaintiff's request for judicial notice (ECF No. 41 at 10-38) is denied.

8 Further, IT IS RECOMMENDED that:

9 1. Defendant Miranda's motion to dismiss (ECF No. 38) be granted;
10 2. Defendant Dr. Ridge's motion to dismiss (ECF No. 38) be denied; and
11 3. This action be transferred to the Fresno Division of the Eastern District of California.

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
17 objections shall be filed and served within fourteen days after service of the objections. The
18 parties are advised that failure to file objections within the specified time may waive the right to
19 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: April 12, 2021

21 
22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28

/freg2196.mtd.sol